Nos. 77-420, 77-421, and 77-436

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-420

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

No. 77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The question presented by the three petitions for a writ of certiorari in this case raises two issues. The first is whether under Section 214 of the Communications Act of 1934, 48 Stat. 1075, as amended, 47 U.S.C. 214, a certificate of public convenience and necessity to construct and operate a channel of communication granted by the Federal Communications Commission to a communications common carrier "as applied for,"

without any other express condition, is restricted to the general category of service the carrier proposed in support of its request for a certificate. If the answer is yes, then the second issue is whether the certificate authority granted by the Commission to specialized communications common carriers is limited to "private line" service.

1. Respondent MCI Telecommunications Corporation and its affiliates ("MCI") hold certificates from the Federal Communications Commission under Section 214,[1] authorizing them to construct and operate a transcontinental point-to-point microwave system. The certificates were issued under a Commission policy statement that provided general guidelines for disposing of some 1713 microwave applications submitted by 33 applicants, almost all of whom were seeking authority to

---

[1]Section 214(a) provides that "the term 'line' means any channel of communication established by the use of appropriate equipment [other than the inter-connection of two or more existing channels]." Section 214(a) further provides that "[n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended lines * * *." However, under the proviso to Section 214(a), no "certificate or other authorization from the Commission [is required] for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of the service provided."

Section 214(c) provides, "[t]he Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

offer some kind of "private line" or business data communication service, as distinguished from public telephone service.[2] *Specialized Common Carrier Services*, 29 F.C.C. 2d 870, 871, affirmed *sub nom. Washington Utilities and Transportation Commission* v. *Federal Communications Commission*, 513 F. 2d 1142 (C.A. 9), certiorari denied, 423 U.S. 836.

In September 1974, MCI filed a tariff with the Commission proposing to offer its subscribers a service called "Execunet." Under this service, any MCI subscriber can connect with any telephone in a distant city served by MCI simply by dialing the local MCI number, an access code connecting him with MCI's point-to-point intercity microwave link, and the telephone number in the distant city. The American Telephone and Telegraph Company ("AT&T") objected that the Execunet tariff amounted to an offer of long distance message telephone service, not "private line" service. The Commission ultimately held in a lengthy opinion that Execunet is not a private line service of the kind specialized common carriers are authorized to provide. *MCI Telecommunications Corp.*, 60 F.C.C. 2d 25 (App. 32a-104a).[3]

On petition for review by MCI, the court of appeals reversed (App. 2a-31a). The court held that under Section 214(a), the Commision may not impose restrictions on the services offered by carriers in tariffs filed with the

---

[2]MCI and other certificated specialized common carriers also were granted radio licenses under Section 308 of the Act (47 U.S.C. 308). The Commission is empowered to classify radio stations and to prescribe the nature of the service to be rendered by each class of station and each station within any class. 47 U.S.C. (and Supp. V) 303.

[3]"App." refers to the appendix filed in No. 77-436 by the Federal Communications Commission.

Commission that are within the scope of their authorizations. It then held that authorizations may be restricted only by express conditions imposed under Section 214(c) after the Commission has found that such restrictions are required by the public convenience and necessity. Since the specialized common carrier decision did not constitute such a determination, the court reasoned, the Commission must accept MCI tariff filings that offer new services over its existing facilities, including Execunet and any other services of which its facilities are physically capable (*ibid.*).

2. The petitioners contend, *inter alia*, that the decision of the court of appeals misconstrues Section 214. They reason that Section 214(a) authorizes the grant of certificates for new communications channels ("lines") only if the Commission finds that the public interest, convenience and necessity so require. Section 214(c) permits the Commission to issue the certificate "as applied for." Since, as the court of appeals recognized, "it is analytically impossible to determine the need for a new facility without considering the services to be provided over it" (App. 22a), petitioners argue that the term "as applied for" should be construed to include the service justification presented by the carrier in support of its request for a certificate. Otherwise, it is contended, the carriers would be able to offer services that the Commission has not affirmatively determined to be required by the public convenience and necessity because the need for services other than those proposed by the carrier in support of its application has never been placed before the Commission. Such a result, petitioners claim, in effect recognizes a doctrine of authorization by inadvertence inconsistent with Section 214's requirement that the Commission affirmatively determine the public

convenience and necessity. Cf. *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86. Under this view of the court's decision, the Commission could limit a grant only by expressly finding that the public convenience and necessity requires that the certificate granted be restricted to the services proposed by the carrier in its application.

We do not understand the Commission to contend that in its *Specialized Common Carrier* decision it in fact made an affirmative determination under Section 214(c) that the public interest, convenience and necessity required that specialized common carrier certificates be restricted to "private line" service. It apparently assumed that such an affirmative determination was unnecessary because it believed the proceedings to be limited to the general category of service presented by the applications it considered in the *Specialized Common Carrier* decision, and that certificates granted under that decision were granted "as applied for" under Section 214(c).[4] The Commission (App. 49a-55a), and the Third and Ninth Circuits, have viewed that decision as involving only

---

[4]In its report and order in Docket No. 19117, *In the Matter of the Establishment of Rules Pertaining to the Authorization of New or Revised Classifications*, 39 F.C.C. 2d 131, the Commission declined to adopt rules that would have expressly required an affirmative determination that any proposed new service was required by the public interest before any carrier could offer that service over its existing facilities. The Commission concluded that such a requirement, originally proposed to protect new specialized communications services (27 F.C.C. 2d 36), was unnecessary because the *Specialized Common Carrier* decision assured development of competitive specialized service. The Commission also declared that all express restrictions in existing domestic authorizations for specialized service under Section 214 were null and void. Specialized carriers may thus offer new services simply by filing a tariff within the scope of their basic authorizations.

"private line service." *Washington Utilities and Transportation Commission* v. *Federal Communications Commission, supra,* 513 F. 2d at 1159; *Bell Telephone Company of Pennsylvania* v. *Federal Communications Commission,* 503 F. 2d 1250, 1260-1261 (C.A. 3), certiorari denied, 422 U.S. 1026.

2. The United States as statutory respondent (28 U.S.C. 2344) supported the Commission in the court below. It believes that the decision of the court of appeals presents important issues as to the kind of determination the Commission must make in issuing certificates under Section 214 of the Act, and as to the scope of outstanding certificates held by specialized common carriers. Nevertheless, the decision of the court of appeals rests upon substantial grounds. Therefore, although the United States agrees with the Commission that this Court should grant review, the United States will reconsider its position on the merits in the light of the court of appeals' reasoning if the petitions are granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

DOJ-1977-11